Supreme Court, U. S.
FILED
FEB 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1217

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Cross-Petitioners,

v.

HENRY A. KISSINGER,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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February 5, 1979

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The Reporters Committee for Freedom of the Press and eleven other professional organizations and writers respectfully cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.[1]

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[1]In addition to the Reporters Committee, cross-petitioners include the American Historical Association, the American Political Science Association, Professors William Leuchtenburg, Clement Vose, James MacGregor Burns, Arthur Link, Austin Ranney and Donald Herzberg, and columnists William Safire, Nat Hentoff and J. Anthony Lukas.

OPINIONS BELOW

The *per curiam* Judgment of the Court of Appeals for the District of Columbia Circuit and accompanying Memorandum are reproduced in the Appendix to Mr. Kissinger's Petition for a Writ of Certiorari ("Pet. App.") at 47a-50a. The Opinion of the District Court for the District of Columbia is reported at 442 F. Supp. 383 and, along with the District Court's Order of January 25, 1978, is reproduced at Pet. App. 51a-62a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1978. On January 8, 1979, Mr. Henry Kissinger, the appellant in the Court of Appeals and a defendant in the District Court, petitioned for a writ of certiorari to review the portion of the Court of Appeals' judgment that was adverse to him. This cross-petition, which seeks review of the portion of the Court of Appeals' judgment that was unfavorable to the Reporters Committee, invokes the jurisdiction of the Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. When the Assistant to the President for National Security Affairs relocated transcripts of his official telephone conversations to the State Department upon becoming Secretary of State and the President made no effort to exercise control over those transcripts after their relocation, did the court below err in determining that the transcripts are nevertheless records of the White House Office of the President which are exempt from the Freedom of Information Act?

2. Are portions of the transcripts which relate to the affairs of the National Security Council in any event subject to disclosure under the Freedom of Information Act in a suit against the State Department where the Council is part of the Executive Office of the President and the Depart-

ment was the last agency with physical custody over the transcripts?

STATUTES

Relevant portions of the Freedom of Information Act, 5 U.S.C. § 552, are reproduced at Pet. App. 1a-11a.

STATEMENT OF THE CASE

The background and development of this case are described fully in the brief which cross-petitioners have filed in opposition to Mr. Kissinger's petition for a writ of certiorari in No. 78-1088. The facts which are relevant to this cross-petition are presented below.

From January 20, 1969 until September 22, 1973, Henry A. Kissinger was Special Assistant to the President for National Security Affairs. In this capacity, he was the ranking official of the National Security Council ("NSC"). From September 22, 1973 until November 3, 1975, Mr. Kissinger held the dual positions of Assistant to the President and Secretary of State. Thereafter, he served solely as Secretary of State until January 20, 1977. Pet. App. 42a.

Throughout this eight-year period, Mr. Kissinger's secretaries recorded his telephone conversations either by shorthand or on tape. Detailed, often verbatim transcripts of those conversations were then prepared for the use of Mr. Kissinger and his aides. Pet. App. 52a. The purpose of this procedure was to assist Mr. Kissinger in performing his governmental duties. As Mr. Kissinger has acknowledged, the notes were "prepared, in accordance with routine government practice, in order to facilitate implementation and follow-up of business transacted." Joint Appendix ("JA") filed in the Court of Appeals, 47.[2]

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[2] A fuller description of the preparation and uses of the notes may be found in Mr. Kissinger's affidavit, reproduced at Pet. App. 73a-85a and in the opinion of the District Court, Pet. App. 51a-58a.

When Mr. Kissinger moved from the White House to the State Department, the notes of his telephone conversations as a Presidential Assistant were relocated in Department files where, over time, they were intermingled with the notes of Mr. Kissinger's telephone conversations as Secretary of State. JA 157. In October, 1976, as he prepared to leave government service, Mr. Kissinger removed all the notes of his telephone conversations from the State Department to the late Nelson Rockefeller's New York estate. Pet. App. 76a-77a. Several weeks later, Mr. Kissinger entered into an agreement "donating" all the notes to the Library of Congress. The agreement places severe restrictions on public access to the notes while assuring their continued availability to Mr. Kissinger. JA 55-61. The notes were delivered to the Library pursuant to this agreement on December 28, 1976. Pet. App. 78a.

On January 13, 1977, eleven of the cross-petitioners asked the State Department to disclose the notes under the Freedom of Information Act ("FOIA"). This request explicitly encompassed the notes of Mr. Kissinger's conversations as both Assistant to the President and Secretary of State. JA 71-74. After the request was denied on January 28, 1977, cross-petitioners filed suit against the Department, the Library, and Mr. Kissinger in the District Court for the District of Columbia. Their complaint, which also encompassed both the White House and State Department notes, sought an order requiring the return of the notes to the Department for review and disclosure in accordance with the FOIA.

On December 8, 1977, the District Court (the Honorable John Lewis Smith, Jr.) ruled on the parties' cross-motions for summary judgment. Emphasizing that the notes recorded official conversations, were used for official purposes, and were prepared using governmental resources, the court held that they were "property of the United States" and had been "wrongfully removed" from governmental

custody by Mr. Kissinger. Pet. App. 58a. Based on this holding, the District Court determined that the portions of the notes which recorded Mr. Kissinger's conversations as Secretary of State had to be returned to the Department for review and possible disclosure under the FOIA. *Id.* Nevertheless, the court declined to grant any relief in connection with the portions of the notes which recorded Mr. Kissinger's conversations as Assistant to the President. Referring to these notes only briefly, the court commented — mistakenly it turned out — that cross-petitioners had withdrawn their claim to them at oral argument. Pet. App. 55a. Cross-petitioners subsequently sought reconsideration of this portion of the court's Opinion on the ground that, according to the transcript, Judge Smith's recollection of oral argument was inaccurate. Nevertheless, in its Order of January 25, 1978, the lower court reaffirmed its refusal to grant any relief in connection with the White House notes. Pet. App. 60a.

On appeal, the Court of Appeals for the District of Columbia Circuit upheld this aspect of the District Court's decision. Acknowledging that the District Court may have misconstrued cross-petitioners' position regarding the White House notes, it nevertheless determined that the result reached by the District Court was correct. Pet. App. 49a. Three considerations, it indicated, supported this conclusion: (1) the FOIA does not cover those Presidential advisers "who are so close to him as to be within the White House"; (2) the relocation of the notes to the State Department was insufficient to bring them within the Department's disclosure responsibilities under the FOIA; and (3) the fact that portions of the notes reflect the affairs of the NSC, an agency to which the FOIA does apply, provided no basis for disclosure in the absence of an FOIA request directed to that agency. Pet. App. 49a-50a.

REASONS FOR GRANTING THE WRIT

In all important respects, the notes that originated when Mr. Kissinger was Secretary of State are identical to the notes of his telephone conversations as Assistant to the President. Both sets of notes record the transaction of official business, were used to assist Mr. Kissinger in discharging his governmental duties, and were prepared by government employees and stored on government premises. Moreover, when Mr. Kissinger retired, both sets of notes were removed from government custody and "donated" to the Library of Congress on the erroneous theory that they were Mr. Kissinger's personal property and, in each instance, the procedures prescribed by Congress for disposing of official records were ignored. Because of these considerations, the lower courts held that the State Department notes were official records that Mr. Kissinger had unlawfully removed from Department custody; this conclusion would have been equally proper for the White House notes as well.

The Court of Appeals nevertheless refused to require the return of the White House notes to Executive Branch custody for review and disclosure under the FOIA on the ground that (1) Mr. Kissinger's status as a presidential advisor rendered these notes exempt from the FOIA, and (2) even if portions of the notes relating to Mr. Kissinger's NSC duties were subject to the FOIA, cross-petitioners could not qualify for relief because they had never made an FOIA request to that agency. Both of these determinations are in conflict with the objectives of the FOIA and other decisions of the lower courts. Because they raise important and far-reaching issues concerning the proper implementation of the FOIA, these determinations should be reviewed by this Court.

1. The term "agency" in the FOIA has never specifically excluded the Presidency. However, in *Soucie v. David*, 448

F.2d 1067, 1074 (D.C. Cir. 1971), the Court of Appeals for the District of Columbia Circuit held that the Presidency should be considered two entities for FOIA purposes: the Executive Office of the President, which includes those formal executive agencies which report to the President, and the White House Office of the President, which includes the President himself and the immediate aides who advise him. The court determined that the Executive Office was covered by the FOIA, but implied that the White House Office was not. 448 F.2d at 1075.

The 1974 amendments to the FOIA specifically provide that the Executive Office of the President is an "agency" to which the Act applies. *See* 5 U.S.C. § 552(e). While the statutory text is silent on the status of the White House Office, the Conference Report for the 1974 amendments indicates that the term "agency" does not include "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. Rep. No. 93-1380, 93rd Cong., 2d Sess. 15 (1974). Based on this legislative history, the District Court for the District of Columbia has held that the FOIA does not apply to the White House Office of the President. *Nixon v. Sampson*, 389 F. Supp. 107, 147 (D.D.C. 1975).

This case, however, does not involve records of a presidential advisor which were retained in the White House for the immediate use of the President and his aides. When Mr. Kissinger resigned as Assistant to the President and became Secretary of State, the notes were moved from the White House to the Department and, thereafter, were filed in Mr. Kissinger's Department office. Moreover, after the notes were transferred, the White House imposed no restrictions on their use and never indicated that it expected the notes to be returned. In short, any interest that the White House might have asserted in the notes was surrendered when the notes left White House custody, and

control over their use and disposition effectively passed to the Department of State.

While the 1974 amendments to the FOIA were under consideration by Congress, the Department of Justice argued that the White House Office should be exempt from the Act because its employees "are among a President's most trusted advisors and the need for those persons to speak candidly on highly confidential matters is obvious." H.R. Rep. No. 93-876, 93rd Cong., 2d Sess. 20 (1974). This rationale has no application to documents which originated in the White House Office but were later circulated to other agencies in the routine course of government business without any effort by the President to exercise continuing control or maintain their confidentiality. Under such circumstances, the justification for exempting records generated by the White House Office from the FOIA is no longer relevant, and those documents should be treated like the records of any other federal agency to which the FOIA applies.

A similar analysis was followed by the Court of Appeals for the District of Columbia Circuit in *Goland* v. *CIA*, ____ F.2d ____, No. 76-0166 (May 23, 1978), which involved an FOIA request for the transcript of a House of Representatives committee hearing that had been loaned to the CIA. The court determined that the transcript remained a Congressional record exempt from the FOIA because of the elaborate precautions that the committee had taken to assure that its hearings were conducted in secrecy and the transcript remained confidential. Slip Op., 12. As the court concluded, the transcript remained "under the control of and continues to be the property of the House of Representatives." *Id.*, 12-13. The court elaborated on this conclusion by explaining:

> "We base our conclusion both on the circumstances attending the document's generation and the conditions attached to its possession by

> the CIA. The facts that the Committee met in executive session and that the Transcript was denominated "Secret" plainly evidence a Congressional intent to maintain Congressional control over the document's confidentiality. The fact that the CIA retains the Transcript solely for internal reference purposes indicates that the document is in no meaningful sense the property of the CIA: the Agency is not free to dispose of the Transcript as it wills, but holds the document, as it were, as a 'trustee' for Congress." *Id.* at 13.

The court cautioned that it reached this result only because "Congress' intent to retain control of the document is clear" and stressed that "[o]ther cases will arise where this intent is less clear." *Id.*, at 14.

Here, in contrast to *Goland*, there is no evidence that the White House exercised any control over the notes of Mr. Kissinger's conversations after they were relocated to the Department of State. In the absence of that control, it must be presumed that the White House abandoned any desire to protect their confidentiality and, thus, that the Department became free to use the notes as it saw fit.

It is no answer to this change in the notes' status to argue, as Mr. Kissinger did in the courts below, that the State Department never acquired "custody" of the notes because they were kept in his "personal" files. If the notes had no connection with Mr. Kissinger's duties as Secretary of State, it would have been unnecessary to store them on Department premises; they would have been left at the White House or removed from government custody altogether. Moreover, Mr. Kissinger has consistently conceded that the notes were used by his Department aides for a variety of job-related purposes (Pet. App. 73a-74a), and it is logical to conclude that this examination included the White House notes as well as the notes generated by Mr. Kissinger at the State Department. Indeed, at the direction

of the Department's Legal Adviser, extracts were prepared upon Mr. Kissinger's retirement not merely of the notes from his State Department period, but of the notes from his White House period as well. This extracting process was conducted by the Undersecretary of State for Management and purported to be based on requirements imposed by Department regulations. JA 264.

In view of the White House's failure to assert any control over their use, the Department's custody of the notes effectively transformed them into State Department "records". To accord the notes a blanket exemption from the FOIA under such circumstances is thus tantamount to holding that any document prepared in the White House Office is immune from FOIA disclosure no matter how widely it is later disseminated throughout the government. Since it is normal government practice for working files to be transferred from one government agency to another, and since documents generated in the White House often have an important impact on the policies of the agencies which receive them, such a holding could seriously erode the disclosure obligations created by the FOIA. For this reason, the decision of the lower court sets a disturbing precedent for future implementation of the FOIA which should be reexamined by this Court.

2. In *Soucie v. David, supra,* the Court of Appeals held that the FOIA applied to the Office of Science and Technology because it was part of the Executive Office of the President. 448 F.2d at 1075. The court suggested that the National Security Council had a similar status, *id.*, at 1074, a view that this Court seemed to share in *EPA v. Mink,* 410 U.S. 73 (1973), where the FOIA was applied to a report prepared by the National Security Council system. The 1974 amendments to the FOIA explicitly define "agency" to include the Executive Office of the President, *see* 5 U.S.C. § 552(e), and the legislative history of these

amendments cites the NSC as an executive agency to which the Act applies. H.R. Rep. No. 93-876, *supra*, at 8.

Cross-petitioners demonstrated in the district court that, during his tenure as Special Assistant to the President for National Security Affairs, Mr. Kissinger was the NSC's chief executive, charged with overseeing the activities of the Council's many standing committees and its staff of experts in national defense and foreign relations.[3] Moreover, as the many published accounts of Mr. Kissinger's White House years indicate, he was an unusually active NSC head, devoting considerable time and energy to directing the policy deliberations of the Council's staff and standing comittees.[4] Accordingly, a sizeable portion of the notes of Mr. Kissinger's White House conversations necessarily relate to the affairs of the NSC, and, at a minimum, these notes are covered by the FOIA.

The Court of Appeals, however, held that cross-petitioners had not qualified for disclosure of NSC-related notes because they had never filed an FOIA request with the NSC. In effect, the court determined that, whenever documents generated by one agency are in the physical custody of another, FOIA requests can only be directed to the originating agency. This approach is not only illogical, it conflicts with both the text of the FOIA and other decisions of the lower courts implementing the Act.

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[3]For example, the editions of the United States Government Organization Manual published by the Office of the Federal Register from 1969 through 1976 specifically designate Mr. Kissinger as the ranking staff official of the NSC. Pertinent pages of these volumes and other materials describing the organization of the NSC staff appear as exhibits to the Reply Memorandum of Points and Authorities In Support of Plaintiffs' Motion for Clarification and Proposed Order, filed in the district court on January 9, 1978.

[4]*See, e.g.*, Marvin and Bernard Kalb, *Kissinger* (1974) and David Landau, *Kissinger: The Uses of Power* (1974).

5 U.S.C. § 552(a)(3) provides that "*each* agency, upon *any* request for records which reasonably describes such records . . . *shall* make the records promptly available to any person" (emphasis added). This provision contains no exemption for records which one agency has acquired from another; rather, it applies to *all* records in the agency's custody regardless of their source. Moreover, 5 U.S.C. § 552(a)(6)(B)(iii) provides that the deadline for answering FOIA requests may be extended for 10 days to permit consultation "with another agency having a substantial interest in the determination of the request . . ." Underlying this provision is an expectation that the agency with physical custody of requested documents would have primary responsibility for disclosing them under the FOIA and, where necessary, the originating agency would participate by offering advice and guidance. Indeed, any other procedure would be grossly inefficient. The FOIA requester who had the misfortune to seek records originated elsewhere in the government would be forced to file an additional request with the originating agency, which would then have to reclaim possession of the documents before the request could be acted upon.

Other decisions of the lower courts have sensibly rejected the approach of the Court of Appeals. *Tax Reform Research Group v. IRS*, 419 F. Supp. 415 (D.D.C. 1976) involved documents originated at the White House and later provided to the IRS by the Department of Justice. In holding that the IRS was required to disclose these documents, the district court pointed out that federal agencies routinely exchange records and the FOIA should therefore be construed so that a request for disclosure may be directed to the last agency where such records are kept:

> "Nor is it decisive that the documents were generated by the White House rather than the IRS. Agencies often utilize or receive copies of documents generated in other agencies, and such

> documents, if identifiable, are clearly agency records for the purposes of the Act. Indeed the Act itself makes provision for this situation. Section 552(a)(6)(B)(iii) allows for a short extension of the Act's time provisions (in responding to a request) in a case where the agency must consult with another agency having a substantial interest in the determination of the request." 419 F. Supp. at 425.

To deny an FOIA request merely because records were originated at some other agency, the court determined, would frustrate the objectives of the Act:

> "To hold that a document received by an agency and actually used by it in agency decision-making is not an agency record for purposes of the Act simply because the document was not generated by that agency or because the decision was on a peripheral matter would seriously undermine one of the central purposes of the Act: to allow the public to become informed on the bases for agency decisions and actions. Such a holding would contradict the mandates of Congress that documents be disclosed unless specifically exempt and that the balance should be tipped in favor of disclosure in questionable situations." *Id.*

Embodying the same basic principle is *Nixon v. Sampson, supra.* In that case, the district court held that records of other federal agencies that, in the course of government business, had been transferred to the Office of the President could be obtained by an FOIA request directed to the President and, thus, an FOIA request to the originating agencies was unnecessary. 389 F. Supp. at 145-146.

Applied in this case, the principles underlying these decisions compel the conclusion that, once they were transferred to the State Department, the portions of the notes

relating to Mr. Kissinger's NSC duties fell within the Department's disclosure responsibilities under the FOIA and a separate FOIA request to the NSC was unnecessary. The contrary holding of the Court of Appeals is illogical and unwise and should not be allowed to stand by this Court.

CONCLUSION

A writ of certiorari should issue to review the portion of the Court of Appeals' decision which affirms the district court's denial of relief in connection with the notes of Mr. Kissinger's telephone conversations as Assistant to the President.

Respectfully submitted,

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RESPONDENT HENRY A. KISSINGER'S BRIEF IN OPPOSITION

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RESPONDENT HENRY A. KISSINGER'S BRIEF IN OPPOSITION

Respondent Henry A. Kissinger respectfully suggests that the cross-petition filed herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia be denied.

COUNTERSTATEMENT OF THE CASE

The basic facts relating to this litigation are set forth in the Petition for a Writ of Certiorari filed in No. 78-1088, which seeks review of the portion of the judgment below

that is adverse to Dr. Kissinger. We repeat here only those facts necessary to an understanding of the cross-petition.[1]

When Dr. Kissinger was Assistant to the President for National Security Affairs, a secretary generally listened to and took notes of his telephone conversations. This was done to ease the administrative burdens of the office. For example, Dr. Kissinger's Executive Secretary checked the notes periodically to make up his appointment calendar; his Senior Special Assistant also read them in order to know whether any matters discussed by telephone required follow-up or implementation. Pet. App. 74a.

These follow-up actions included the preparation of letters and memoranda which were circulated in the ordinary course of business and filed as permanent records of the office. The notes, however, were never circulated to other persons in the government or seen by anyone other than Dr. Kissinger's immediate aides. They were rough and unedited; they were used as work aids, not records, and as such were always kept in Dr. Kissinger's office along with other private papers in files marked "personal." Pet. App. 74a-75a.

When Dr. Kissinger became Secretary of State, his personal files, including the White House telephone notes, were physically removed to his office in the State Department. The notes were stored there in separate personal files until October 29, 1976, when, in preparation for Dr. Kissinger's retirement from office, they were placed for safe keeping in a bank-type vault at the estate of then Vice President Rockefeller. Pet. App. 76a-77a. On December 28, 1976, Dr. Kissinger donated the White House notes, and similar notes made when he was Secretary of State, to the

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[1] Most of the facts appear in Dr. Kissinger's uncontroverted affidavit, which is contained in the Appendix to the Petition for a Writ of Certiorari filed in No. 78-1088 ("Pet. App."). Other references are to the Joint Appendix ("JA") filed in the Court of Appeals.

United States pursuant to a deed of gift agreement signed by him and the Librarian of Congress. Pet. App. 77a-78a; JA 77.

After Dr. Kissinger made the donation, cross-petitioners filed a Freedom of Information Act ("FOIA") request with the Department of State demanding access to

> [a]ll transcribed secretarial notes of the telephone conversations held by Henry Kissinger during his government service as Assistant to the President for National Security Affairs, commencing on or about January 20, 1969, and during his service as Secretary of State, extending through the present time. JA 71.

The Department denied the request on the ground that none of the documents in question were State Department agency records. JA 75.

Following this denial, cross-petitioners sued the incumbent Secretary of State, Cyrus R. Vance, the Librarian of Congress, Daniel J. Boorstin, and Dr. Kissinger. Their complaint, which purported to be based on FOIA, alleged that the notes of Dr. Kissinger's conversations, both as a Presidential Assistant and as Secretary of State, "have always been the property of the Department of State," JA 33, 43, 46; it requested a declaration that "legal and equitable title to the secretarial notes has always been in the Department of State," JA 53; and it asked for an order directing the State Department to repossess and thereafter disclose to them the non-exempt portions of the notes. *Id.*

On cross-motions for summary judgment, the District Court held that the notes made of Dr. Kissinger's telephone conversations while he was Secretary of State were State Department "agency records" which must be returned to the Department for processing and eventual release under

FOIA. It declined, however, to reach the same conclusion with respect to the notes made when Dr. Kissinger was a Presidential Assistant, and rendered summary judgment in his favor on this issue. Pet. App. 59a-60a. The Court of Appeals affirmed the District Court's decision on both points. Pet. App. 47a-48a.

In the Memorandum accompanying its *per curiam* judgment, the Court of Appeals stated that the District Court had properly rejected cross-petitioners' claim to the White House period notes because

> (1) The Freedom of Information Act does not extend to those of the President's advisers who are so close to him as to be within the White House rather than the Executive Office of the President [citations omitted]. (2) The mere relocation of these documents to the State Department without any indication that they were used by that agency does not render them State Department records obtainable via an FOIA request to that department. (3) The speculation that some of these earlier transcripts concerned the affairs of the National Security Council adds nothing to plaintiffs' claim because no FOIA request was made of the Security Council, and, as mentioned above, the transfer of the notes to the State Department does not change their character. Pet. App. 49a-50a.

REASONS FOR DENYING THE WRIT

The portion of the decision below which relates to the notes made when Dr. Kissinger was Secretary of State raises substantial questions concerning the scope of FOIA, the relationship between that Act and the recordkeeping practices of agencies under the Federal Records Act, and

the constitutional privacy rights of past and present federal officials. *See* the Petition for a Writ of Certiorari filed in No. 78-1088. These same questions would, of course, be presented here if the courts below had concluded that the White House period notes were subject to cross-petitioners' FOIA claims. However, the conclusion actually reached — that cross-petitioners had no FOIA access rights to notes made of Dr. Kissinger's telephone conversations when he was a Presidential Assistant — raises no substantial legal issue meriting review by this Court. Indeed, the only issues cross-petitioners present relate to factual questions resolved against them both in the District Court and in the Court of Appeals. There is no reason why this Court should exercise its certiorari jurisdiction to permit reexamination of the findings made below.

I.

Cross-petitioners do not dispute the Court of Appeals' conclusion that

> [t]he Freedom of Information Act does not extend to those of the President's advisers who are so close to him as to be within the White House rather than the Executive Office of the President. Pet. App. 49a.

Nor could they do so, because it is plain that FOIA does not apply to the papers of Presidential Assistants.[2] Faced with this insurmountable obstacle, cross-petitioners instead argue that

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[2] FOIA applies only to "agency records." The Office of the President, to which Dr. Kissinger was assigned, is not an "agency." 5 U.S.C. §552(e); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); Conf. Rep. No. 93-502, 94th Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6267, 6293. This basic statutory principle is so clear that counsel for the other respondents in No. 78-1088 advised the District Court his clients had for this reason made no FOIA claim for the White House notes. Tr. 57-58 (September 28, 1977).

> documents which originated in the White House but were later circulated to other agencies in the routine course of government business without any effort by the President to exercise continuing control or maintain their confidentiality . . . should be treated like the records of any other federal agency to which FOIA applies. Cross-Petition at 8.

It is unnecessary for this Court to consider whether cross-petitioners' theory is legally sound, because there is no basis for applying it in the circumstances of this case. The notes of Dr. Kissinger's White House conversations were not "circulated" to the State Department "in the routine course of government business," *Id.*; the Department was not "free to use the notes as it saw fit," *Id.* at 9; it never obtained "custody" of the notes, *Id.* at 10; and it never had "control over their use and disposition." *Id.* at 8.

The record shows that the notes were treated as personal papers and kept in separate personal files when Dr. Kissinger was at the White House; when he moved to the State Department, these same files were relocated to his new office and "continued to be maintained in separate personal files during my years at the Department." Pet. App. 76a. The record further shows that the notes were never circulated outside Dr. Kissinger's office, and that only he and his immediate aides had access to them. Pet. App. 74a-75a. The State Department did not "possess" or "control" these files any more than it would have possessed or controlled them had they been lodged in Dr. Kissinger's basement.[3]

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[3] Cross-petitioners suggest that the failure of the White House to assert continuing control over the notes shows it "surrendered" them to the State Department. Cross-Petition at 7-8, 9. We think the White House's lack of interest in the notes simply confirms Dr. Kissinger's testimony that these papers were "work aids which I could retain or discard as I chose." Pet. App. 74a. Moreover, as the opinion of the State

The only connection between the White House notes and the State Department was the fact that they were once physically stored there in Dr. Kissinger's personal files.[4] The Court of Appeals correctly concluded that

> [t]he mere relocation of these documents to the State Department *without any indication that they were used by that agency* does not render them State Department records obtainable via an FOIA request to that department. Pet. App. 50a (emphasis supplied).

There is no reason why this Court should intervene to reconsider the factual accuracy of that finding.

II.

Cross-petitioners also argue that some of the White House period notes might be records of the National Security Council, and that "the portions of the notes relating to Mr. Kissinger's NSC duties fell within the [State] Department's disclosure responsibilities under the FOIA. . . ." Cross-Petition at 13-14. There is no evidence whatever that

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Department's Legal Adviser makes clear, the Department did not itself attempt to exercise any control over the notes because it believed they were personal papers which it neither owned nor had the right to possess. Pet. App. 66a, 69a.

[4] Cross-petitioners assert it is "logical to conclude" that the White House notes were used for a "variety of job-related purposes" after they were relocated to the State Department. Cross-Petition at 9. There is no evidence whatever to support this assertion. Since the sole use made of the notes was to keep Dr. Kissinger's appointment calendar current and to permit his Senior Special Assistant to keep abreast of his daily activities, Pet. App. 74a, the only "logical" inference is that the White House notes were not used for any purpose while they were stored at the State Department.

any of the notes are NSC records.[5] But even if it were assumed that this is the case, cross-petitioners' argument must fail.

First, the argument presupposes that the State Department was the "last agency with physical custody" of the notes. *Id.* at 3. This is not true. The State Department, as such, had no access to, or custody or control over, any of the documents stored in Dr. Kissinger's personal files. If the White House notes contained NSC records, the last agency having custody was the NSC, not the State Department. Since the "mere relocation" of the notes did not "change their character," Pet. App. 50a, and cross-petitioners made no FOIA request to the NSC, the Court of Appeals correctly held that "[t]he speculation that some of these earlier transcripts concerned the affairs" of a non-party agency "adds nothing" to cross-petitioners' claim. *Id.*

Second, the NSC theory is inconsistent with the case cross-petitioners submitted for judgment in the District Court. Cross-petitioners' complaint did not allege that the White House notes were NSC records; it alleged that these notes reflected conversations "held by defendant Kissinger during his service as Assistant to the President for National Security Affairs." JA 33, 42. Although Dr. Kissinger pointed out at the very beginning of the litigation that the papers of Presidential Assistants could not be subject to

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[5] Cross-petitioners speculate that some of the White House notes "necessarily relate to the affairs of the NSC" because of Dr. Kissinger's connection with the Council. Cross-Petition at 11. As Assistant to the President for National Security Affairs, Dr. Kissinger doubtless discussed the "affairs" of many agencies, but this does not mean the notes of such conversations can be characterized as the "records" of the agencies discussed. The Governmental Organizational Manuals to which cross-petitioners refer always list Dr. Kissinger's position with the NSC as "Assistant to the President." There is no basis whatever for inferring that the notes at issue here reflect conversations made in any other capacity.

FOIA, cross-petitioners never moved to amend their pleadings to allege that any of the White House notes were NSC records and never introduced any evidence to show that they were.

The theory of cross-petitioners' summary judgment motion was that the White House notes were State Department records; the NSC alternative did not surface until *after* the District Court issued its opinion denying cross-petitioners' claim. Cross-petitioners' post-decision efforts to change the theory of their motion were properly disregarded by the District Court, and just as properly rejected by the Court of Appeals. There is no reason why this Court should grant review to entertain an argument that was not properly presented below, and which in any event was correctly characterized by the Court of Appeals as "speculation." Pet. App. 50a.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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March 7, 1979.

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Supreme Court, U. S.
FILED
APR. 9 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1217

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Cross-Petitioners,

v.

HENRY A. KISSINGER, *et. al.*,

Respondents.

REPLY BRIEF FOR CROSS-PETITIONERS

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April 9, 1979

THE CASILLAS PRESS, INC.—1717 K Street N. W.—Washington, D. C.—223-1220

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REPLY BRIEF FOR CROSS-PETITIONERS

This Reply Brief is occasioned by the Brief of the federal respondents, who support the grant of this petition and the petition in No. 78-1008, urge that the Court decide some questions presented by the petitions but not others, and suggest that this case be set for argument in tandem with *Forsham v. Califano*, No. 78-1118. Cross-petitioners are disturbed by several aspects of the Government's position and believe their concerns should be brought to the attention of the Court before it acts on the pending cross-petitions.

1. The Government contends that the District Court's application of the Freedom of Information Act ("FOIA") to documents that are no longer in the State Department's physical custody raises issues "of sufficient general importance to warrant review by this Court." Brief for the

Federal Respondents ("Br.") 9. The history of this litigation, however, reveals that the Government's interest in these issues has surfaced at a remarkably late date. Although the District Court required the Department of State to retrieve the notes of Mr. Kissinger's conversations from the Library of Congress, the Government did not appeal from its decision. Instead, it appeared in the Court of Appeals solely as an *amicus curiae* and advised the Court that it "had proceeded at the trial level in a nominal capacity."[1]

Because the government defendants did not object to the order entered by the District Court, the Court of Appeals found that it was "unnecessary" to consider most of the issues raised by Mr. Kissinger, including the application of the FOIA to documents which were no longer in the Department's physical custody. Pet. App. 49a. For similar reasons, there is substantial ground to question whether this issue may be considered by this Court. Since the Government did not object in the lower courts to retrieving documents from a non-agency for disclosure under the FOIA, there is no party in this litigation with standing to challenge that retrieval now. At the very least, the Government's posture in the courts below contradicts its belated conclusion that this issue has great "general importance" and diminishes the weight which that conclusion should receive from this Court.

2. The Government also maintains that this case is "closely related" to *Forsham v. Califano*, No. 78-1118, and implies that the decisions in these two cases by the Court of Appeals for the District of Columbia Circuit rest on divergent rationales. Br. 9. We believe that, taken together, these decisions reflect a coherent and correct interpretation of the FOIA by the Court of Appeals, and that further review by this Court is unnecessary.

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[1] Brief for the United States as Amicus Curiae 3.

There are important differences between the raw research data at issue in *Forsham* and the notes of Mr. Kissinger's telephone conversations at issue here. The raw data in *Forsham* were created by private universities which were federal grantees. They had always been held at the University of Maryland, outside the physical custody of any federal agency, and were not, and had never been, in the possession of any federal employee. By contrast, the notes of Mr. Kissinger's telephone conversations were generated by a cabinet officer to aid in transacting official business, were used by other Department employees for this purpose, and remained in the State Department's possession for an extended period before leaving government custody.

In holding that the raw data in *Forsham* were not "records" subject to the FOIA, the Court of Appeals rested its decision not on the physical location of the data but on the lack of significant government involvement in their creation and use. 587 F.2d at 1138-39. In effect, the Court held that the data were not agency records because they were not government "property." Indeed, all three members of the *Forsham* panel agreed that government participation in the creation and use of disputed documents, and not physical possession, should determine whether the FOIA applies. *Id.* at 1136, 1139 and 1140.

The lower courts invoked the same rationale in deciding this case. The District Court determined that the notes of Mr. Kissinger's conversations had been "prepared and transcribed 'in the discharge of his official duties'." Pet. App. 58a. It therefore concluded that the notes were still "property" of the Department of State and, despite their physical location, were subject to disclosure under the FOIA. The Court of Appeals agreed with this approach. Pet. App. 49a. Thus, there is no conflict between the decisions below in *Forsham* and this case. While involving divergent facts, each decision recognizes that the FOIA applies to documents which are government property,

regardless of their physical location. We submit that this doctrine is correct and need not be re-examined by this Court.

3. The Government acknowledges that the notes of Mr. Kissinger's conversations were Department "records" at the time of their removal from Department custody. Br. 10. Cross-petitioners are, of course, in full accord with this conclusion. However, the Government then argues that the legality of the notes' removal from Department possession has no bearing on whether they remain subject to the FOIA. Hence, the Government urges, the Court should determine whether the FOIA is applicable to the notes without regard to whether they were agency "records" at the time that they left the Department. *Id.* 11. We believe that these two issues cannot be divorced, and that any effort to consider one in isolation from the other may lead to a misguided decision.

The FOIA applies to agency "records." 5 U.S.C. § 522(a)(4)(B). A document created to facilitate agency business but removed from its custody in accordance with the document disposal procedures of the Federal Records Act is no longer owned or controlled by the agency. We agree that such a document, which has been disposed of *lawfully*, is not a "record" subject to the FOIA and the agency cannot be compelled to retrieve it in response to an FOIA request.

A very different situation exists, however, when a document has been removed from agency custody, not in accordance with the record disposal procedures of the Federal Records Act, but as a result of the unauthorized acts of individual agency officials. Such documents do not cease to be agency "records" merely because they are no longer in the agency's physical custody. In every respect except physical location, they remain agency property and continue to be subject to the agency's legal control. The application of the FOIA to unlawfully removed records should not depend on whether the agency has taken steps to retrieve them. But for that removal, these records would

still be available for FOIA disclosure. It would contravene the intent of Congress in enacting the Act if the public's rights of access were extinguished whenever agency employees remove records in violation of law and the agency takes no action to secure their return.

The availability of FOIA relief in these limited circumstances would not impose undue burdens on the Government. The Federal Records Act, augmented by regulations of GSA and individual agencies, contains a comprehensive scheme for reviewing records that agencies wish to discard and determining whether those records are no longer necessary for the transaction of government business. When records have been removed from agency custody in accordance with these requirements, the agency's actions will normally be unreviewable under the FOIA, and the documents will not be subject to FOIA disclosure. Under the decisions of the courts below, a remedy under the Act would be available only when — as in this case — applicable procedures for records disposition have been ignored and the agency has made no effort to recover wrongfully removed documents. Contrary to the Government, applying the FOIA in this uncommon situation will not increase the duties of federal agencies under the FOIA or otherwise impede their operations.

4. While supporting the grant of certiorari in No. 78-1217, the Government urges the Court not to determine whether the portions of the White House notes which relate to Mr. Kissinger's National Security Council duties are subject to FOIA disclosure in this suit. Br. 8-9. This position is puzzling. It is customary for the President's National Security Advisor to serve as the NSC's Chief Executive. Whether the FOIA applies to documents generated by the National Security Advisor in this capacity is therefore an issue of broad importance which will recur if not definitively resolved here. Moreover, documents originated by one agency are frequently used by other agencies. If, as the Court below held, FOIA requests for such documents must be directed to the originating agency,

FOIA requesters will experience increased delays and burdens. Thus, this issue, too, has broad implications for effective implementation of the FOIA. Finally, piecemeal review of the portion of the lower court's decision relating to the White House notes would be impractical and unfair. If the Court agrees to consider whether these notes should be disclosed to cross-petitioners, it should take into account all possible grounds on which such disclosure might be based.

Mr. Kissinger has suggested that, in the proceedings below, cross-petitioners did not focus on his NSC duties in a timely manner and, hence, the issue was inadequately considered by the lower courts.[2] This contention is misleading and inaccurate. By seeking access to the notes of Mr. Kissinger's conversations as Assistant to the President, cross-petitioners' Complaint necessarily encompassed conversations relating to the NSC; as noted above, the Assistant to the President for National Security Affairs has traditionally functioned as the Council's chief executive. Moreover, when Mr. Kissinger opposed their motion for summary judgment by arguing that the White House Office is exempt from the FOIA, cross-petitioners responded by pointing out that the Executive Office, including the NSC, is not within this exemption. As a result, both before and after the parties' cross-motions for summary judgment were decided by the District Court, the special status of the NSC notes was briefed thoroughly by cross-petitioners and Mr. Kissinger.[3] The issue was then briefed again in the

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[2]Respondent Henry A. Kissinger's Brief in Opposition 8-9.

[3]*E.g.*, Plaintiffs' Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, in Opposition to Defendant Kissinger's Motion for Summary Judgment and in Opposition to the Government's Request for Production of Documents, August 8, 1977, at 45-46; Reply Memorandum of Points and Authorities by Defendant Henry A. Kissinger in Support of His Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, August 22, 1977, at 12-13.

Court of Appeals by all parties, including the Government, and decided on its merits. Thus, the application of the FOIA to transcripts of conversations relating to Mr. Kissinger's NSC duties was raised in a timely manner below and is properly before this Court now.

The Court should grant the petition for a writ of certiorari in No. 78-1217 and deny the petition in No. 78-1088.

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April 9, 1979